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No. 93-1639

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, Cross-Petitioner

v.

STATE OF ALASKA, ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD, CITY & BOROUGH OF JUNEAU and ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS, Cross-Respondents

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

OPPOSITION BRIEF OF STATE OF ALASKA AND THE ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the IRS can create an asset for seizure by forcing the State of Alaska to transfer a liquor license in contravention of state-created conditions on transferability of the license.

2. Whether the Twenty-first Amendment to the United States Constitution precludes the IRS from enforcement of its federal tax lien by foreclosure and transfer of a state-created liquor license in contravention of the state's laws regulating liquor.

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I

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OPPOSITION BRIEF FOR CROSS-RESPONDENTS THE ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS AND STATE OF ALASKA, ALCOHOLIC BEVERAGE CONTROL BOARD

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions described at Cross-Pet. App. at 2-3, the statutory and constitutional provisions described at Pet. App. at 23-35 are also involved in this case.

STATEMENT OF CASE

A complete statement of the facts is set forth in the order entered in this case by the United States District Court, District of Alaska. (Cross Pet. Appendix D at 11a - 13a) Petitioners/Cross-Respondents do not dispute this recitation of the facts by the lower court.

For purposes of this cross-petition, however, the following facts are pertinent. An Alaska liquor license exists and is distinguished from other types of property because it is wholly created by state statute. Only those applicants who meet the statutory requirements may hold and operate a liquor license. Alaska Stat. § 04.11.010. In creating a liquor license interest, Alaska allowed limited transferability of the license. All transfers of a liquor license must be approved by the State of Alaska Alcoholic Beverage Control Board (hereinafter "ABC Board"). Alaska Stat. § 04.11.040. The licensee only has the right to petition the ABC Board for transfer of the license. Alaska Stat. § 04.11.280. Alaska Stat. § 04.11.360 enumerates twelve conditions mandating denial of transfer of a liquor license including that "the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title" or made provision for satisfaction of those debts. Other than its use by a licensee to sell alcoholic beverages, a liquor license has value only upon transfer.

Marcello and Nancy Quinto operated a bar in Juneau, Alaska, known as the Office Lounge. The Quintos held an Alaska liquor license. In 1985 and 1986, the Quintos became delinquent in their taxes in the operation of the Office Lounge, including federal and state employment taxes and local sales and property taxes. The Quintos also

became delinquent in pension contributions owed to the Alaska Hotel and Restaurant Pension Trust Fund (hereinafter "Pension Fund") on behalf of their employees.

On July 28, 1986, Juneau recorded a notice of tax lien against the Quintos for $24,854.22. On September 29, 1986, the IRS assessed delinquent taxes against the Quintos totalling $14,389.94. 26 U.S.C. §§ 6321, 6322. On September 30, 1986, despite a specific statutory provision prohibiting foreclosure (Alaska Stat. § 04.11.670), the IRS levied upon all the Quintos' property and purportedly seized their liquor license by taking possession of the piece of paper hanging on the wall of the Office Lounge identifying the license.

On October 22, 1986, the IRS published notice of sale of the license and purchased it for $14,827.43, the amount of the Quintos' federal tax liability. The IRS did not attempt to qualify under Alaska statutes as a liquor license holder.

Over a year later in September 1987, the IRS auctioned the license to Ira Rosen and John Henry on behalf of Wayne Entertainment.[1] The IRS executed a "Certificate of Sale" to Wayne Entertainment. This certificate purportedly transferred "all right, title and interest of the United States" in the liquor license. This sale for $20,500 was accomplished despite the fact that an Alaskan bar liquor license had a far greater fair market value at that time.

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[1] Prior to the sale, the IRS made assurances to the City and Borough of Juneau that the taxes owed the municipality would be paid from the proceeds of the sale of the license. (Cross Pet. Appendix D at 13a; CR 33, Aff'd at 3; CR 39, Att. F to Aff'd at 2)

After the IRS had auctioned the liquor license, the IRS applied to the ABC Board to transfer the license to Wayne Entertainment. Pursuant to Alaska Stat. § 04.11.470, the State of Alaska, the City and Borough of Juneau, and the Pension Fund filed objections to the transfer of the liquor license. Pursuant to Alaska Stat. § 04.11.360(4), the ABC Board denied the IRS's application to transfer the liquor license to Wayne Entertainment.

The federal government initiated an action in the United States District Court for the District of Alaska to quiet title to the license free of all debts and taxes, including the taxes owed the City and Borough of Juneau and the State of Alaska.[2] (Pet. App. at 18) The federal government sought an order compelling the Alaska ABC Board to transfer the liquor license to its buyer. (Pet. App. at 5, 18)

ARGUMENT

A. Summary of Argument

The importance and substantiality of the questions presented in the decision below and the need for supervision by the United States Supreme Court are uncontested by all parties. The only areas of dispute between the parties are two. First, whether this case is a proper vehicle for resolution of the important and recurring questions and second, the precise framing of those questions for review.

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[2] The position the IRS now takes before this Court conflicts with the position it took before the district court. The IRS now asserts that the municipality would have held a lien on the license after transfer to Wayne Entertainment. This position ignores state liquor law which precludes liens and foreclosures on liquor licenses. Alaska Stat. §§ 04.11.450, 04.11.670. The municipality could only assert its tax claim at the time of transfer of the liquor license to Wayne Entertainment. Alaska Stat. § 04.11.360(4)(A).

The petition of the State of Alaska and Pension Fund frames the issue of what exact property interest exists in a state-created liquor license for attachment of a federal tax lien. Since this case frames this issue outside of and uncluttered by bankruptcy court proceedings found in other cases addressing the issue, this case is most appropriate for review of the question. Petitioners/Cross-Respondents also submit that a conflict in the circuit courts exists as to the proper analysis of what interest the federal government may obtain in a state-created liquor license upon attachment of a federal tax lien. This Court's review is needed to decide whether the "nature of the property interest" analysis (Ninth Circuit) or the "priority of claims" analysis (Sixth Circuit) is the more appropriate legal analysis in the determination of the extent of the federal government's claim.

B. The Conflict In The United States Courts Of Appeals Has Occurred Predominately In Bankruptcy Related Cases.

The federal government has identified the conflict in the United States courts of appeals. In the Ninth Circuit decisions, the court recognized that when a state creates property, the nature of the property interest created includes state requirements of satisfaction of state and local taxes before transfer. *United States v. Stone*, 6 F.3d 581 (9th Cir. 1993); *In re Kimura (United States v. Battley)*, 969 F.2d 806 (9th Cir. 1992); and *United States v. California*, 281 F.2d 726 (9th Cir. 1960). In the Sixth Circuit decision in *In re Terwilliger Catering (Bavely v. United States)*, 911 F.2d 1168 (1990), *cert. denied sub nom. Ohio Dep't of Taxation v. IRS*, 111 S. Ct. 2815 (1991), the court felt that the state requirement that state taxes be paid prior to transfer was not a component of the property interest, but a priority or debt collection scheme.

Id. at 1173. With the exception of the 1960 *California* decision, these cases creating a conflict in the circuits arose in the context of competing priority claims of creditors in the debtor/taxpayer's bankruptcy proceeding. *See also In re Anchorage Int'l Inn (Artus v. Alaska Dep't of Labor)*, 718 F.2d 1446 (9th Cir. 1983); *In re Professional Bar Co. (Sulmeyer v. California, Dep't of Employment Dev.)*, 537 F.2d 339 (9th Cir. 1976); *California v. Farmer's Market Inc.*, 792 F.2d 1400 (9th Cir. 1986).

Significantly, in the case at bar, the issue arises in the context of the IRS attempt to foreclose on the state-created liquor license and force the transfer of the state-created property interest in contravention of the statutory framework creating the license. The issue here is not embroiled in the competing claims of creditors claiming priority in bankruptcy court; the sole factual issue presented here is -- what is the nature of the property interest of the taxpayer in the state-created liquor license which the federal government seeks to attach and transfer?

In this case, the appropriateness of creating conditions of transfer as part of the property interest created is presented in stark detail. Here, it can be seen the federal government is attempting to force a transfer of property that the taxpayer/holder of the license could not attempt. If the state has the power to create a liquor license so that it could *never* be transferred, it must necessarily have the power to create reasonable and nondiscriminatory conditions of transfer that apply with equal force to the IRS. *United States v. California*, 281 F.2d at 728 ("If the state had seen fit to impose conditions upon issuance or transfer of property it has wholly created, that is the state's prerogative so long as its demands are not arbitrary or discriminatory.") This case is the most appropriate vehicle for resolution of the question conceded by the federal

government to be one of "recurring national importance."[3] (Cross-Pet. at 9)

C. The Question Presented Is Which Analysis Of The State-Created Property Interest Is Correct.

The conflict within the circuits identified by the federal government arises from two separate approaches taken by the Ninth and Sixth Circuits in the legal analysis of a wholly state-created property -- a liquor license. In both circuits, the courts have identified the threshold issue to be the determination of the nature of that property to which an IRS federal tax lien may attach. However, the Ninth Circuit views the statutorily-set conditions on transfer of the liquor license, i.e. payment of taxes, as an integral part of that property interest to which the federal tax lien attaches. The Sixth Circuit views those statutory conditions as merely a debt collection scheme which changes the priority of claims to be paid.

Petitioners/Cross-Respondents have referred to this dichotomy as the "nature of the property interest" analysis of the Ninth Circuit Court of Appeals as opposed to the "priority of claims" analysis employed by the Sixth Circuit Court of Appeals. Interestingly this dichotomy is also demonstrated quite vividly by the differing recitation of questions presented for review identified by Petitioners/ Cross-Respondents and the United States in this case:

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[3] As pointed out by the United States, there are numerous states with similar statutes. See Ariz. Rev. Stat. Ann. § 4-210(A)(5) (1989 & Supp. 1993); Cal. Bus. & Prof. Code § 24049 (West 1985); Haw. Rev. Stat. § 281-45(3) (1992); Md. Ann. Code art. 2B, § 74(a)(1) (1993); N.M. Stat. Ann. § 7-1-82(A) (1993); Pa. Stat. Ann. tit. 47, § 4-477(d)(3) (Supp. 1994); R.I. Gen. Laws § 3-5-19 (1987); S.D. Codified Laws Ann. § 35-2-7 (1992).

Petitioner/Cross-Respondent's Questions Presented	United States' Questions Presented
1. Whether the IRS can create an asset for seizure by forcing the State of Alaska to transfer a liquor license in contravention of the state-created conditions on transferability of the license.	1. Whether, by requiring state liquor licensees to pay all outstanding state and local taxes as a condition for approval of any transfer of the license, the State of Alaska may obtain priority in the distribution of the proceeds of the sale of the license over a perfected federal tax lien.
2. Whether the Twenty-first Amendment to the United States Constitution precludes the IRS from enforcement of its federal tax lien by foreclosure and transfer of the state-created liquor license in contravention of the state's laws regulating liquor.	2. Whether the sale by the Internal Revenue Service of the taxpayer's interest in a liquor license to which a federal tax lien has attached must be rescinded because state and local tax claims have not been paid in full.

(Emphasis added.)

The supervision of the this Court is needed to determine which of the approaches to the analysis of state-created liquor licenses should prevail. Under a "nature of the property" analysis, it can be seen that the IRS, when it seized the liquor license, acquired at most whatever property interest the Quintos held. The IRS was thereby subject to the same conditions of transfer as the Quintos including the need to provide for payment of all debts under Alaska statute. Under the federal government's analysis, the IRS is promoted to a higher level of property interest in the liquor license than that held by the taxpayer

because of its super-priority as a federal tax lien. The state-created conditions of transfer fall by the wayside as a contravening priority system. The states' rights under the Twenty-first Amendment to control the sale and distribution in alcohol within their borders is disregarded. In light of the inability of the United States courts of appeals to address uniformly this issue of the transferability of state-created property interests, the need for plenary review by this Court is indisputable.

Upon this Court's granting review of the initial petition, review of the United States' cross-petition is unnecessary because the federal government's questions are subsumed within Alaska and Pension Fund's petition. Petitioners/Cross-Respondents request this court to grant its petition and deny the cross-petition.

DATED this 18th day of May, 1994

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